

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill prohibits private transfer fee covenants on real property.

B. EFFECT OF PROPOSED CHANGES:

Background:

Covenants and Restrictions - In General

A covenant occurs when the seller of real property places a condition or conditions in the deed that act as restrictions binding upon future owners of the property. A covenant must "run with the land" to be valid and bind future owners.¹ A covenant runs with the land when it relates to the land and binds the successor grantees indefinitely. Under common law, covenants do not run with the title to real property unless the covenants "touch and concern the land."² In order for a covenant to "touch and concern the land," the covenant must somehow affect or be bound up in the use of the land.³

A restraint on alienation of property occurs when a property owner is prevented from disposing of all or part of his or her property. Under common law, restraints on alienation were disfavored because the courts wanted the owner of the property to be able to dispose of the property as he or she desired.⁴ Today, restraints on alienation of property are often found to be against public policy, unless they serve a legal and useful purpose. If an interest is found to be an unreasonable restraint on alienation, it is void and unenforceable under common law principles.⁵ Therefore, public policy favors the marketability and transferability of real property without restraints on alienation.

Covenants and Restrictions - Transfer Fee Covenants

A transfer fee covenant places restrictions in a deed to real property that requires the payment of a transfer fee every time the property is transferred to a new owner. The fee can be payable to any person or entity. Transfer fee covenants, which are a relatively new phenomenon that began in California and Texas, often require a fee of 1 to 2 percent of the purchase price be paid every time the property is sold.⁶ Transfer fee covenants do not appear to be removable under current law.⁷ Furthermore, current statutory law does not specifically address transfer fee covenants.

Transfer fee covenants are used in many different ways. They are used to fund homeowners' associations, address environmental concerns associated with new housing developments, and help builders pay for parks, agricultural preservation, affordable housing and other benefits that are often required as conditions for projects approved by local governments. Private property sellers have started to utilize transfer fee covenants as a means of additional future income for themselves.⁸ Private transfer fees can be placed on new homes and constitute a private agreement between the homebuyer and either the homebuilder or the home owner and can theoretically fund anything.

¹ *Lanier v. Burnette*, 245 Ga. App. 566 (2000).

² *Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 146 Wash. 2d 194, 43 (2002).

³ *Id.*

⁴ *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276 (Ct. App. 1992).

⁵ *Robbins v. HNG Oil Co.*, 878 S.W.2d 351 (Tex. App. Beaumont 1994).

⁶ Timm Herdt, *Realtors, Builders Battle over Property Transfer Fee*, Ventura County Star, May 9, 2007.

⁷ *Id.*

⁸ William Jason, *Homebuilders, Realtors Differ on Transfer Fees*, North Bay Business Journal, July 30, 2007, at <http://www.busjrnl.com/article/20070730/BUSINESSJOURNAL/70729026/1209>.

It is alleged that homebuyers are often not aware of a transfer fee on their property until they appear at closing because the existence of the fee is listed in fine print in the covenants, conditions and restrictions.⁹ From an economic standpoint, transfer fee covenants could reduce the future value of a homeowner's property due to the economic burden that such covenants place on future sales.¹⁰

Florida appellate courts have not ruled on whether or not a private transfer fee covenant violates the common law principle that a covenant must run with the land or public policy against the restraint on alienation of property.

Effect of Bill:

This bill creates s. 689.28, F.S., declaring that transfer fee covenants violate legislative intent and public policy. This bill provides that transfer fee covenants violate public policy by impairing the marketability and transferability of real property, causing unreasonable restraints on alienation, and not touching and concerning the land. This bill further provides that all transfer fee covenants that meet the definition provided in this section are void and unenforceable if entered into after July 1, 2008.

This bill defines transfer fee covenants as the payment of a transfer fee to the person declared in the covenant or their successors or assigns upon a transfer of interest in real property. This bill lists nine circumstances in which a fee is not considered a transfer fee covenant for purposes of this bill. It is not considered a transfer fee covenant under this bill when a fee is:

- An obligation between the grantor and grantee for payment of additional subsequent consideration.
- Any commission payable to a licensed real estate broker.
- Amounts payable by a borrower to a lender in connection with a loan secured by a mortgage on the real property, including assumption fees or fees for estoppels letters or certificates and any shared appreciation interest payable to the lender in connection with the loan.
- Any amounts payable by a lessee to a lessor under a lease including those for consenting to an assignment encumbrance or transfer of the lease.
- Any payments to the holder of an option to purchase.
- Any fees or other charges payable or imposed by a governmental authority.
- Fees or other charges payable to a homeowners' association or other property owners' association.
- Fees or dues payable under community association documents to nonprofit organizations for the benefit of the community.
- Any payments required pursuant to an environmental covenant.

This bill only applies to transfer fee covenants that are recorded by owners on or after the effective date of the bill. Since courts have not ruled in Florida whether or not existing transfer fee covenants are voidable under existing common law principles, this bill disclaims that existing transfer fee covenants are valid simply because they were recorded before the effective date of this bill.

C. SECTION DIRECTORY:

Section 1 creates s. 689.28, F.S., relating to a prohibition against transfer fee covenants.

Section 2 provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

⁹ Dinah Eng, *New Borrower, Buyer Protections in '08 - Greater disclosure about mortgage products and transfer fees are among laws about to take effect*, Los Angeles Times, December 30, 2007.

¹⁰ *Id.*

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may decrease the cost to future homebuyers by declaring transfer fee covenants invalid and unenforceable.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On February 20, 2008, the Committee on Courts adopted one amendment to this bill. The amendment made the following revisions to the bill:

- Added that any fee or due regarding the purchase or transfer of club membership related to the property is not a transfer fee under the bill.
- Added that it is not a transfer fee under the bill when a fee or charge is made to a *charitable organization* for the purposes listed in the section.
- Added that a fee to a nonprofit or charitable organization for *environmental or conservation* purposes is not a transfer fee under the bill.
- Added that it is not a transfer fee when an *association's authorized agent* collects a fee or charge for an estoppel letter or certificate.
- Revised s. 692.01, F.S., to conform to other statutes and provide for conveyances *executed* by corporations.
- Revised s. 689.01, F.S., to provide that corporations may *execute conveyances* instead of just *convey*.

The bill was then reported favorably with an amendment.